

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
BRIEF**

26-1182

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Pls

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

JAMES GRIMSLY,

Defendant-Appellant.

*On Appeal from the United States District Court for the Eastern
District of New York.*

BRIEF FOR DEFENDANT-APPELLANT

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1

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76 - 1192

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

WILLIAM J. JOYCE, et al.,

Defendant-Appellants.

BRIEF FOR APPELLANT
JAMES GRIMSLEY

Preliminary Statement

The Appellant, James Grimsley, was indicted, together with 11 others, under indictment No. 75 CR. 488 and charged with conspiracy to possess goods stolen from interstate commerce. Although indictment 75 CR. 488 did not charge Mr. Grimsley with the substantive offense of possession in violation of 18 U.S.C. §659, as it had with each of the other co-defendants, a subsequent indictment, 75 CR. 975, did accuse Mr.

Grimsley of that crime.

The indictments were consolidated for trial and the jury found M. Grimsley not guilty of conspiracy under indictment 75 CR. 488 but guilty of possession under indictment 75 CR. 975. On April 23, 1976, the court sentenced the Appellant to imprisonment for three years with a condition that the Appellant be confined in a jail-type institution for a period of two months. The remainder of the sentence was suspended and the Appellant, Grimsley, was placed on probation for three years. It is from that conviction that the Appellant appeals.

STATEMENT OF THE FACTS

On March 17, 1975, 117 cartons of Timex watches were stolen from Kennedy Airport while they were moving as part of a foreign shipment of freight. *(T 859-931) Robert Schoenly, a co-defendant, testified that William J. Joyce told him that he had stolen the merchandise and that he had it in a truck. (T 82). Donald Walsh, a cousin of Mr. Joyce, told Mr. Schoenly that he knew a place where the merchandise could be stored. Mr. Shoenly, pursuant to Mr. Walsh's instructions, rented a truck to move the merchandise. (T 85-93).

* T - Transcript of the Trial.

Peter Areiter, another co-defendant, testified that on the evening of March 17, 1975 he, Mr. Burns, Mr. Walsh and Mr. Bovell transferred cartons from one truck into another and then transported those cartons to Janet Terri's house. He testified that the cartons had wrapping around them when they delivered them to Miss Terri's house. Mr. Areiter stated that he was to receive \$3.000 for moving the boxes and that Mr. Burns' wedding was to be paid for. (T 293-298). That testimony was corroborated by Mr. Burns. (T 420-433).

On March 21, 1975, the cartons were moved from Janet Terri's house to Island Park by Messrs. Walsh, Bovell, Freudigger and Areiter. The wrapping had been removed from the boxes at that time. Plastic bags with wrapping in them were also taken from Janet Terri's house (T 95-106). The cartons were then transported from Island Park to Leonard Nitti's garage. (T 436-440).

Mr. Boyle testified that on March 24, 1975 Mr. Joyce asked him if he knew anyone who would be willing to buy the watches which were stolen from Kennedy Airport. Mr. Boyle mentioned to a few people that the watches were available and waited for a response. On March 27, 1975 he received a telephone call from a person named Joe who said that he wanted to buy the watches. (Joe turned out to be Detective Giordano who was acting in an undercover capacity).

After an agreement was reached with Joe to purchase the watches, Mr. Boyle called William Joyce to arrange for delivery of the watches. Mr. Joyce told Mr. Boyle that he was having a problem getting a truck for delivery. Mr. Boyle told Mr. Joyce that he would make arrangements to get a truck. Mr. Boyle stated that he telephoned Mr. Grimsley, the Appellant herein, and asked if he was interested in moving stolen watches from Valley Stream to Brooklyn for \$250.00. Mr. Grimsley accepted the offer and he and Mr. Burns transported the boxes to a garage in Brooklyn where he was arrested while unloading the boxes from his truck.
(T 590-605).

F.B.I. Agent Van Nostrand testified that after his arrest, Mr. Grimsley gave a statement regarding his involvement. After taking his statement, Agent Van Nostrand testified that he asked Mr. Grimsley whether he knew the goods were stolen and Mr. Grimsley answered yes. "I think he said in response to one of my questions, he said that the way this was handled it couldn't be anything else but stolen." (T 722-725).

Mr. Grimsley testified that when Mr. Boyle telephoned him he asked whether he would be interested in moving some boxes for him for a "few bucks". He denied that Mr. Boyle ever said that the boxes contained stolen property. He testified that the boxes were not in wrappings when he moved

them and that he /id not see any marking on the boxes. He testified that the first time he knew that the boxes contained watches or suspected that anything was wrong was seconds before his arrest when he saw a box opened and a large amount of money being paid Mr. Boyle. (T 997-1007).

Mr. Grimsley testified that at the end of the interview Agent Van Nostrand asked him "Do you know these watches are stolen?" and he replied "I said - so I said - back to him, well it's rather obvious. I wouldn't be down here under arrest". He denied that he ever told the F.B.I. that he knew the watches were stolen at a time when he was moving the boxes (T 1009).

He further testified that he never met Mr. Joyce or Mr. Burns prior to March 27, 1975 and that he never saw Miss Terri or Messrs. Walsh, Bovell, Freudiger, Hanan, Nitti, Schoenly or Areiter prior to coming to court (T 1011-1013).

QUESTION PRESENTED

Whether the court's charge on the issue of knowledge was error.

ARGUMENT

POINT I

THE COURT'S CHARGE
ON THE ELEMENT OF
KNOWLEDGE WAS ERROR

The sole issue for the jury to determine in considering Mr. Grimsley's case was whether or not he knew the goods, which he had in his possession, were stolen.

The defendant Grimsley requested the court to charge that:

"In order to convict the defendants of possessing stolen property the government must prove beyond a reasonable doubt that the defendant 'actually knew' that the watches were stolen. Mere suspicion is not enough."

In considering that request the court stated:

"I am not going to give one of those words, but I will give it in terms of actual knowledge. Mere suspicion, of course, I will charge that in essence." (T 1446)

The court's instructions to the jury on the issue of knowledge follows:

"[O]ne of the critical questions is whether the defendants knew they had possession of stolen watches. Actual knowledge that a defendant received and then possessed stolen watches is one of the essential elements of the offense charged.

You may not find a defendant guilty unless you find beyond a reasonable doubt that he or she knew that he or she received and was then in possession of stolen merchandise. The fact

of knowledge may be established by direct or circumstantial evidence just as any other fact in the case. Knowledge may be proven by a defendant's conduct since we have no way of looking into a person's mind directly.

Two of the defendants have flatly testified that they had no such knowledge. Now, in this connection bear in mind that one may not willfully and intentionally remain ignorant of a fact, important and material to his conduct, in order to escape the consequences of the criminal law.

If you find from all the evidence beyond a reasonable doubt that any defendant believed he or she received and was then in possession of stolen watches and deliberately and consciously tried to avoid learning that the watches in question were stolen in order to be able to say, should he or she be apprehended, that he or she did not know, you may treat this deliberate avoidance of positive knowledge as the equivalent of knowledge.

In other words, you may find that any defendant acted knowingly if you find that either he or she actually knew that he or she had received stolen watches or that he or she deliberately closed his or her eyes to what he or she had every reason to believe was the fact.

I should like to emphasize, ladies and gentlemen, that the requisite knowledge cannot be established by demonstrating merely negligence or even foolishness on the part of a defendant.

One of the elements of the crime charged is that the accused knew that the Timex watches he, she or they possessed were stolen. As I have already instructed you, that must be proven beyond a reasonable doubt.

Knowledge is something that you cannot see with the eye or touch with the finger. It is seldom possible to prove it by direct evidence. The government relies largely on circumstantial evidence in this case to establish knowledge.

In deciding whether a defendant knew the Timex watches were stolen, you should consider all the circumstances, such as how a defendant handled the transaction, how he, she or they conducted himself, herself or themselves. Do his, her or their actions betray guilty knowledge that he, she or they were dealing with stolen watches or are the actions those of a duped, innocent man or woman or one who is just acting negligently or carelessly.

Guilty knowledge cannot be established by demonstrating merely negligence or even foolishness on the part of a defendant.

Knowledge that the goods have been stolen may be inferred from circumstances that would convince a man of ordinary intelligence that this is a fact. The element of knowledge may be satisfied by proof that a defendant deliberately closed his or her eyes to what otherwise would have been obvious to him or her.

In this connection you should scrutinize the entire conduct of a defendant at or near the time the offenses are alleged to have been committed." (T 1475-1478).

The defendant Grimsley took exception to the underlined portion of the court's charge but no additional or corrective instructions were given on that issue. (T 1512, 1513).

In order to convict a defendant of the crime of possessing stolen property the government is required to prove that the defendant "actually knew" that the property was stolen. United States v. Fields, 466 F.2d 119 (2 Cir. 1972).

In Fields, the court charged that:

"In addition, the government need not prove that the defendant actually knew it was stolen property. If the evidence, circumstantial or otherwise, tends to prove knowledge of the contents and also of the trailer itself being stolen, that would be sufficient."

There the court reversed the conviction holding that the above quoted charge was plain error in that it was contrary to the law, since the government must prove actual knowledge that the goods were stolen.

We submit that the charge given herein was also error in that it was misleading and relieved the jury of the duty of affirmatively finding that the defendant had "actual knowledge". While we recognize that the underlined portion of the charge objected to herein has been referred to and approved by this court in, United States v. Joly, 493 F.2d 672 (2 Cir., 1974); United States v. Olivares-Vega, 495 F.2d 827 (2 Cir., 1974) and United States v. Jacobs, 475 F.2d 270 (2 Cir., 1973), we contend that inclusion of the so called "studied ignorance" charge was not warranted under the facts herein.

In United States v. Joly, supra, there was no direct evidence that Joly knew that he was carrying cocaine under his belt and he insisted that he did not know what was inside the package which a man gave him to carry through customs for \$100.00. Under those facts this court approved the charge

that

"one may not willfully and intentionally remain ignorant of a fact, important and material to his conduct, in order to escape the consequences of the criminal law"..."In other words, you may find the defendant acted knowingly if you find that either he actually knew he had cocaine or that he deliberately closed his eyes to what he had every reason to believe was the fact."

In United States v. Olivares-Vega, *supra*, the appellant was a long standing airline employee; who admitted that a suitcase in which cocaine was found seemed unusually heavy and that he had been asked by a fellow worker to take the suitcase to a hotel to deliver it to an unknown party for \$300.00, testified the courts charge that, if they found that the defendant did not learn what the suitcase contained only because he deliberately chose not to learn in order to be able to assert his ignorance, the jury could find that he had the legal equivalent of knowledge.

In United States v. Jacobs, *supra*, there was again no direct evidence of knowledge but the circumstances shrieked o. guilty knowledge. There an attorney offered to sell treasury bills, matured or about to mature, at a 65 percent discount. The evidence also showed that a certificate to be presented to the Treasury showed a discount of only 10 percent rather than the actual 65 percent. Doubts were expressed by another lawyer

and an accountant as to whether the sale was legitimate and yet the defendant made no effort to determine whether the bills were stolen. Under those facts the court approved the "conscious avoidance" charge noting that it is proper where the evidence establishes that the actor consciously shuts his eyes to avoid knowing whether or not he is committing unlawful acts.

The facts in the case at bar are distinguishable in that none of the suspicious circumstances, such as in the cases cited above, existed.

Mr. Grimsley received a telephone call from Mr. Boyle, a man he had known for a number of years who asked whether he could use his truck to move some boxes. Depending on whose version the jury believed, Mr. Grimsley was to receive either \$200.00 or a few bucks. Mr. Grimsley moved the boxes from a garage in Queens to a garage in Brooklyn where he was arrested two hours later. We submit that those circumstances did not justify a conscious avoidance charge since the evidence did not establish that Mr. Grimsley consciously shut his eyes to avoid knowing whether or not he was committing an unlawful act.

Moreover, a factor which clearly distinguishes this case from the other cases cited is that in our case, there was direct evidence of knowledge. Mr. Boyle testified that

he told Mr. Grimsley that the goods were stolen and Agent Van Nostrand testified that Mr. Grimsley admitted he knew the goods were stolen. Mr. Grimsley denied that Mr. Boyle told him that the goods were stolen and he testified that Agent Van Nostrand misunderstood him. Under these facts the jury should merely have been instructed that the government must prove that the defendant had actual knowledge. The "conscious avoidance" charge was unwarranted, misleading and relieved the jury of the obligation of affirmatively finding knowledge.

POINT II

THE APPELLANT ADOPTS ALL RELEVANT ARGUMENTS MADE IN CO-APPELLANTS' BRIEFS

Pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure, the appellant Grimsley adopts all relevant arguments made in any co-appellant's brief.

CONCLUSION

The defendant Grimsley's conviction should be reversed.

Respectfully submitted,

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A 201 Affidavit of Service by Mail
COURT OF APPEALS
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LUTZ APPELLATE PRINTERS, INC.

Index No.

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- against -

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Affidavit of Service by Mail

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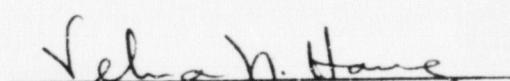
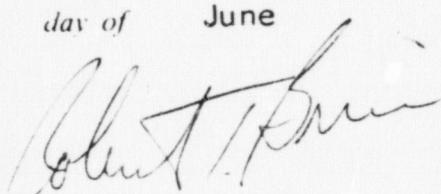
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I, Velma N. Howe, being duly sworn,
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
298 Macon Street, Brooklyn, New York 11216
That on the 28th day of June 1976, deponent served the annexed

BRIEF upon David Trager attorney(s) for
Plaintiff- Appellee in this action, at 225 Cadman Plaza, Brooklyn, New York

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purpose by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in a
Post Office Official Depository under the exclusive care and custody of the United States Post Office
Department, within the State of New York.

Sworn to before me, this 28th
day of June 1976



VELMA N. HOWE

ROBERT T. BRIN
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No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977